U.S. Department of Labor

Office of Administrative Law Judges
John W. McCormack Post Office and Courthouse
Room 505
Boston, MA 02109

(617) 223-9355
(617) 223-4254 (FAX)

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CASE NOS.: 2001-LHC-1992; 2001-LHC-3379

OWCP NOS.: 1-124427; 1-150724

In The Matter Of:

KEVIN M. DAY
Claimant

v.

ELECTRIC BOAT CORPORATION
Employer/Self-Insurer

APPEARANCES:

Scott N. Roberts, Esq.
For the Claimant

Michael J. Feeney, Esq.
For the Employer/Self-Insurer

BEFORE: DAVID W. DI NARDI
District Chief Judge

DECISION AND ORDER - AWARDING MEDICAL BENEFITS

This is a claim for workers' compensation benefits under the Longshore and Harbor Workers' Compensation Act, as amended (33 U.S.C. §901, **et seq.**), herein referred to as the "Act." The hearing was held on February 19, 2002 in New London, Connecticut, at which time all parties were given the opportunity to present evidence and oral arguments. The following references will be used: TR for the official hearing transcript, ALJ EX for an exhibit offered by this Administrative Law Judge, CX for a Claimant's exhibit and RX for an Employer's exhibit. This decision is being rendered after having given full consideration to the entire record.

Post-hearing evidence has been admitted as:

Exhibit No.	Item	Filing Date
EX 38	Attorney Feeney's letter filing a	03/14/02
EX 38A	Copy of his March 12, 2002 letter to District Director Marcia Finn, as well as	03/14/02
EX 39	Forms LS-210 filed by the Employer with reference to Claimant's shipyard accidents (totaling eleven (11) pages)	03/14/02
CX 17	Attorney Robert's letter filing the	05/02/02
CX 18	April 11, 2002 Deposition Testimony of S. Pearce Browning, III, M.D.	05/02/02
EX 40	Attorney Feeney's letter filing the	05/15/02
EX 41	April 9, 2002 transcript of the supplemental testimony of the Claimant, as well as the	05/15/02
EX 42	April 11, 2002 Deposition Testimony of William Wainright, M.D., as well as the	05/15/02
EX 43	Forms LS-210 for various dates between 1982 and 1994	05/15/02
EX 44	Employer's brief	06/03/02

The record was closed on June 3, 2002 as no further documents were filed.

Stipulations and Issues

The parties stipulate, and I find:

1. The Act applies to this proceeding.

2. Claimant and the Employer were in an employee-employer relationship at the relevant times.

3. Claimant alleges that he suffered an injury on April 1, 1992 to his neck and right hand in the course and scope of his employment.

4. The parties attended an informal conference on January 10, 2001.

5. The applicable average weekly wage is $482.21.

6. The Employer voluntarily and without an award has paid benefits under the Longshore Act and the state act, for a total of $82,044.81.

The unresolved issues in this proceeding are:

1. Whether Claimant's current disability is causally related to his April 1, 1992 alleged injury.

2. If so, whether he has timely filed for benefits.

3. If so, the nature and extent of his current disability.

4. The date of his maximum medical improvement.

Summary of the Evidence

Kevin M. Day ("Claimant" herein), fifty-two (52) years of age and with an employment history of manual labor, began working in January of 1975 as a so-called burner/grinder at the Quonset Point Facility of the General Dynamics Corporation ("Employer"), North Kingstown, Rhode Island, a maritime facility adjacent to the navigable waters of the Narragansett Bay and the Atlantic Ocean where the Employer fabricates hull cylinders, sections and other components which are then transported by ocean-going barges to the Employer's shipyard at Groton, Connecticut where the cylinders, sections and components are installed on the submarines under construction at that shipyard. Claimant, as a burner/grinder in the Employer's Cylinder Fabrication Department, daily used various pneumatic or air-powered vibratory tools to cut and grind metal plates which Claimant described as "three feet long and about two feet wide" and weighing "about 40 to 50 pounds." (TR 33-34; EX 17 at 2-4)

On October 27, 1981, Claimant injured his back and neck as he lifted one of the plates to install it on the hull. He reported the injury to his supervisor and then to appropriate personnel at the Yard Hospital. He was taken out of work and treated by Dr. Richard Bertini conservatively with medication, rest and physical therapy. Claimant also injured his neck and shoulder in 1978 when he "had a machine slip off the hull and pull(ed him) down." He was

treated at RIGHA Hospital for that injury and he was out of work for "two weeks." He then returned to "full duty" work. After his return to restricted work after his October of 1981 injury, he was assigned to light work in the planning office of the pipe shop, Claimant describing his duties as clerical work, "Making up packages, paperwork for piping installation." (TR 34-36; EX 17 at 4-7)

Dr. Bertini continued to treat Claimant's lumbar and cervical problems as needed (EX 13) and, as the symptoms persisted, the doctor referred Claimant to Dr. Bernstein for a myelogram, and that February 12, 1992 test showed a herniated cervical disk at C5-C6. A cervical fusion was recommended but Claimant has declined that "too drastic" surgery. In 1992 Claimant began experiencing numbness, pain and aching in both hands; he reported these symptoms to his immediate supervisor and to appropriate personnel at the Yard Hospital. Claimant discussed these symptoms with Dr. Bertini and the doctor referred him to Dr. Cotter. Dr. Cotter prescribed certain tests and these tests "showed carpal tunnel problems." (EX 15) Claimant was then referred to Dr. Garrett Dubois and the doctor performed a right carpal tunnel release in July of 1993. (CX 13) He was out of work for almost two months and he was returned to work on September 20, 1993 (EX 9) with the cautionary advise to avoid any exertion that would aggravate his lumbar, cervical or hand problems. Claimant's February 3, 1994 cervical spine MRI showed worsening results. (CX 14; TR 36-37; RX 17 at 8-11)

Claimant continued to perform his repetitive clerical duties and on April 1, 1992 he experienced the immediate onset of right hand pain as a result of the repetitive use of the keyboard, as well as an increase of his neck pain while lifting some heavy files out of a cabinet. He reported the injury to his supervisor and to appropriate personnel at the Yard Hospital. He also went to see Dr. Bertini. Claimant testified that his daily and repetitive duties in the planning office aggravated and worsened his lumbar, cervical and hand problems. While Claimant was laid-off in 1994, he believes that his seniority status should have allowed him to remain at Quonset Point but that he was laid-off solely because he was a compensation case on light duty status. He continued to receive compensation benefits until 1995 and he finally settled his state claim in 1995. (In this regard, **see** RX 20, RX 21; TR 37-46)

As Claimant closed out his right to future compensation and medical benefits by that state settlement and as he was told by his former attorney that he had no right to future medical care. Claimant did not seek medical treatment after August 29, 1995 until March 19, 2001, at which time he went to see Dr. Browning. He has looked for work but was unable to find work within his restrictions. In 1997 he finally found work as a fiberoptic technician at Augat and he continued to work for that company until May of 2001, at which time the company was purchased by another

company and his job was moved to Tennessee. He is presently waiting to be recalled by that company to a job that he can perform. He experiences daily lumbar, cervical and hand pain and just about any physical exertion aggravates those symptoms. He has been told to learn how to live with that pain. Prolonged standing also aggravates his symptoms. He also experienced a heart attack while at work for Augat in 1999. He was out of work for almost three months, was treated by Dr. Korr and was paid his regular salary by that employer. He recalls meeting with Kathleen Dolan, the Employer's vocational rehabilitation counselor, and he does not believe that he can perform any of the jobs in her labor market survey, for various reasons. (EX 26)

Claimant's lumbar, cervical and hand problems are worse now than when he left the Employer in 1994. In fact, the stress and uncertainty of these long-standing claims have added to his problems and that is why he went to see Attorney Roberts in early 2001 to find out what can be done for him. Since he left the Employer, he has worked for CDI - a temporary employment agency - for about one month, as well as at Augat. He will try any job because he has to support his family and he will work with vocational counselors to discuss retraining for other work. (TR 46-58) Claimant's post-injury wage records are in evidence as CX 16.

Claimant's bilateral hand problems are best summarized by the March 21, 2001 report of Dr. S. Pearce Browning, III, one of the nation's foremost hand specialists, wherein the doctor states as follows (CX 2):

I saw Kevin Day in the office on March 19, 2001. This had been delayed from January 9, 2001 because Mr. Day was sick.

Mr. Day started as a burner and grinder in 1975 and worked in that position at Quonset Point into 1982 or 1982. At that time, he had a back injury and he was reassigned and did mostly handling paper. Making up packets of blue-prints, and so on, and finally he was laid off in 1994. Between 1981-or-82 and 1994 he would occasionally try and go back to being a burner/grinder and use the air tools. This would usually last from 4-6 weeks.

During the second half of his employment, he has a repetitive aspect to his work. He was required to use a large handstamp on blueprints, for which he used only the right hand, and he was required to put things together with a heavy stapler, which he used to hit with the right hand, so that there is an additional work injury from the stapler and stamping papers to the right hand that did not occur with the left hand.

From 1994 to 1997 Mr. Day had only occasional employment, and then he started as a fiberoptic technician splicing and installing cables. This company was Thomas & Betts, which has apparently been

absorbed or bought out by Alcoa/Fujimara. He does not use any air or vibrating tools in his present work.

Mr. Day is a 51-year-old white male with dark hair, height 5’9", weight 200, and he is right-handed.

He has a spine injury, for which he has been treated. This was a work-related injury going back, as noted, to 1981-82. He did not have surgery on it.

Not related to his employment, he has had cardiac problems. He had an angioplasty in 1999 or 2000. His present medications include Pravachol, Plavix, Prilosec, Metroprolol, and something for blood pressure.

He did, as you note, eventually have carpal tunnel release on the right hand but not on the left, and Dr. Galini, who did the electrodiagnostic studies on June 1, 1992, noted a mild carpal tunnel and also changes in other areas of the arm, including the deltoid, flexor carpi radialis, brachialis, et al. The carpal tunnel surgery was done by Dr. Dubois in Pawtucket, RI.

He has had considerable trouble with the neck. Eventually, Dr. Hayes had rated that at 10% of the entire person. Most of the discomfort is on the right side of the neck with involvement of the scapula area and shoulders, as well as down the arm. The neck injury goes back to 1978 when a machine came off the hull and dropped. It was held on by magnets.

The low back (injury), as noted, was 1981, when he was carrying metal plates weighing 40 pounds up a ladder and then turning to put them in place. He had an MRI at the time and was told of an L5-S1 disc. He did not have a myelogram. We would not have had either CT or MRI capability in 1978-80.

Further notes on this general medical history include the fact that he wears glasses. The heart is as mentioned above. He has not had trouble with the lungs, asthma, allergies, GI system, GU system, hernias, diabetes, thyroid disease, anemia, phlebitis, rheumatoid arthritis, or Lyme disease. He has apparently had a touch of gout, including the big toe, when he had his angioplasty. He says his blood pressure has been doing all right.

He has had no injuries outside of EB. His personal physician is Dr. Steven Kempner of North Main Street, Providence, RI...

His fingers show no evidence of atrophy, edema or ulcerations. There is a surgical scar at the base of the palm of the right hand.

I got x-rays of the cervical spine, which show considerable narrowing of the disc spaces. X-rays of the back show that the lumbar spine disc spaces aren’t too bad, but there is definite

sclerosis in the right sacroiliac joint area on the side of the ilium.

On examination of his back, he's able to flex 50^0, straight leg raise right 55^0, left 55^0. Ankle reflexes are out. Knee reflexes right 2, left one.

In the neck, there is considerable restriction. I would say the range of motion is down about 50%.

His electrodiagnostic tests with Dr. Alessi really show some improvement from those done by Dr. Galini, and apparently some of the elements from the cervical disc are better and the impairment in the median nerve is better.

The vascular studies show that the temperatures in all digits were below 30^0C and had to be warmed up. On the right hand, three digits did not make it back to 30^0 by ten minutes, and on the left two digits did not. They all came back to 33^0 by 15 minutes.

He has some abnormal lab work. The uric acid was 10.5, globulin 4.3, cholesterol 258, triglycerides 463, and TSH 5.42. I will write his personal physician, Dr. Kempner, about this.

He has had a rating assigned to the neck by Dr. Hayes, 10% of the entire person, and I think I would accept that. So far, he has done without any surgery on the neck, but certainly this is not excluded for the future. The cervical spine x-ray today also showed narrowing at C4-5.

X-rays of the lumbar spine showed extensive sclerosis in the right sacroiliac joint. No fracture or dislocation. I think maybe some mild narrowing at the L5-S1 disc space. He is able to flex about 50^0, straight leg raise 55^0 right and left. The ankle reflex is out. The knee reflex is right 2-, left 1. He has significant limitation also in the range of motion in the neck.

Since he has no acute problem requiring surgery, I will not try to get an MRI, but if his symptoms get worse I would. I would recommend a rating of 12% of the lumbar spine. In view of the changes in the sacroiliac joint, I think that this could be secondary to either injury or to some type of inflammatory process, but the lab work shows a borderline sed rate of 21. The employer could give consideration to a section 8F claim for the back. If the employer wants to do that, it would need to be looked at more carefully and a MRI would need to be done.

Going to the hands, I would assign 15% for the neuromuscular side. He has had an operation on the right hand, not on the left. He has had damage on multiple electrodiagnostic testing. What is important to note is that the fifth finger is involved extensively, which is not a median nerve distribution. He also has a very

severe loss of the ability to feel 30 Hertz vibration in both the right and the left hands.

He certainly has vasospasm, based on his temperatures here. His ambient temperatures at the Vascular Lab on January 18, 2001 were below 30^0C. He was able to be rewarmed, and he actually came back to higher than he was before the ice challenge bath. However, in view of the fact that he has consistently low temperatures, I would assign 20% for the vascular side.

This will make a total of **32% permanent partial impairment of the right master hand and 32% permanent partial impairment of the left non-master hand**.

I have sent both Mr. Day and Dr. Kempner copies of his lab work with this letter.

Copies of his vascular studies, neurologic material and lab work are attached, according to the doctor.

Dr. Browning sent the following letter to Dr. Steven Marc Kempner on July 2, 2001 (CX 2D):

I have seen your patient, Mr. Kevin Day, to evaluate his injuries at the request of his attorney. Mr. Day has Hand/Arm Vibration Syndrome with fairly severe vasospasm. He also has electrodiagnostic evidence of damage, although it's a bit better than it was in the early '90s.

Hand/Arm Vibration Syndrome is not helped by carpal tunnel release. It also involves all of the nerves in the hand, not only the median nerve, but both the volar and dorsal branches of the ulnar nerve and radial nerve.

He has a considerable amount of sclerosis in the right sacroiliac joint, and this may be due to injury. At this time, I have not recommended an MRI of the lumbar spine, but if clinically it seems appropriate in the future, I would not hesitate to go ahead and get one...

I have no follow-up plans for Mr. Day at this time, but if I can be of any help to you and Mr. Day in his further care, I will be glad to help. If you have any questions, please give me a phone call or write me.

Dr. Browning sent the following letter to Attorney Roberts on July 18, 2001 (CX 2E):

The return to normal temperatures after they've been rewarmed occasionally occurs, and I've seen it before. The recovery is slow; it's not normal at ten minutes.

I think what happens is that the hand warming has broken up the vasospasm.

Since he has vasospasm and not an obstruction, the temperatures can fluctuate according to the amount of spasm in the arteries. When he was here in my office on January 9, 2001, his temperatures were between 21-24^{0}C, indicating marked vasospasm at the time. Dr. Wainright does not have a meter, and he does not measure temperatures, so we have no objective measurement of what his finger temperatures were, except when he was at the Vascular Lab and my office, according to the doctor.

The Employer has referred Claimant for an examination by its orthopedic specialist, Dr. John W. Hayes, and the doctor sent the following letter on April 6, 1994 to the Employer's workers' compensation adjusting firm (EX 31):

The above captioned patient was seen and examined at your request in my office on March 31, 1994 at which time he provided the following history.

He is a 44-year-old male who sustained a lower back injury in 1982 from which he never entirely recovered. He was under the care of Dr. Bertini because of that injury, and when he did return to work, he did so in a light duty capacity basically in a clerical capacity stuffing envelopes.

He continued in this light duty occupation for a period of nine or ten years. Then on April 1, 1992, he was lifting some plans. This involved repetitive motion, and he began to develop neck pain.

This was subsequently followed by the development of aching in his right hand. He reported this to his supervisor.

He subsequently came under the care of Dr. Walter Cotter and was referred for an electromyogram which the patient indicates demonstrated a carpal tunnel syndrome as well as some problems related to his cervical spine.

He had a cervical MRI which the patient indicates demonstrated disc damage at C5-6 or C6-7.

The MRI report itself was not available, but in the report of Dr. Cotter dated March 10, 1992, it was described as demonstrating a central disc herniation at C6-7 with bony osteophyte and a large central and left osteophyte protrusion as well as disc protrusion as C5-6. These would certainly appear to be chronic changes and is certainly not of an acute nature. It is also interesting to note that this report was dictated by Dr. Cotter on March 10, 1992, and he attributes the problem to the injury of January 7, 1982. It is clear that those changes, by definition, preceded anything that

occurred on April 1, 1992.

The patient indicates that Dr. Cotter suggested neck surgery to him, and again it is important to note that this recommendation was made prior to the incident of April 1, 1992.

The patient indicated he had been symptomatic for four or five years.

The patient elected not to have the neck surgery and was referred to Dr. Dubois and had a right carpal tunnel release.

He had another MRI done of his neck which was ordered by Dr. Dubois on February 3, 1994, and I have no results from that study. He indicates it showed “disc damage.” This is obviously to be anticipated since there was some evidence of chronic disc damage at least two years earlier.

The patient is now under the care of Dr. Bertini whom he sees once every two months.

Following his carpal tunnel release, the patient did, in fact, return to light duty after a period of two months and continued to work in that capacity until he was laid off on February 14, 1994.

He has remained out of work and has been referred to Dr. Knuckey for further evaluation of his neck.

He indicates he feels terrible and has constant neck pain radiating to the right side of his neck and shoulder with some weakness in his right arm. He complains of increased discomfort if he sneezes.

Physical examination revealed a well-developed well-nourished male who appeared in no particular discomfort or distress. He walked with a normal gait and exhibited normal posture of his neck and normal motion of his upper extremities.

Examination of his right hand showed a well-healed, 2" volar surgical scar which was neither swollen nor tender. He had a negative Tinel sign over the carpal tunnel and no evidence of thenar wasting. There was no appreciable weakness.

Examination of his neck showed normal preservation of the cervical lordosis. He had diffuse tenderness and mild spasm in the paracervical musculature with approximately a 50% restriction of the range of motion of his neck in all planes.

He has no specific spasm or tenderness in the supraspinati and a normal range of shoulder motion. The neurological examination of his upper extremities was normal.

I had an opportunity to review the cervical MRI which demonstrated a defect at the C5-6 level.

Impression and comments: This history is somewhat confusing in the sense that reference is made to an incident of April 1, 1992 as the date of injury and yet most of the patient's complaints and many of the objective findings which substantiate them clearly existed long prior to this incident.

It would appear that the patient had chronic cervical disc disease which has gone back for many years.

In addition, he developed a carpal tunnel syndrome for which he has undergone surgical treatment with an excellent clinical result.

He has no residual impairment or disability based on his carpal tunnel syndrome.

He has both subjective complaints and objective evidence of chronic cervical disc disease which have been present for years and was certainly present prior to April 1, 1992.

On the basis of his neck condition, I would consider him disabled for heavy employment but certainly not disabled for the clerical employment which he describes as having performed prior to April 1, 1992 for a period of ten years and which in fact he apparently performed following his carpal tunnel surgery until the time he was laid off.

In that sense, his disability is certainly only partial.

In restricting him to light employment, he would be limited as to such activities as repetitive bending and heavy lifting, use of his arms for heavy work in an overhead position or the requirement to work with his neck in a cramped or awkward position. As a corollary, he would have difficulty with activities which required the use of a hard hat.

He would certainly appear to have reached a point of maximum medical improvement in the absence of surgical intervention and probably did so prior to April 1, 1992.

In so far as I am aware, the patient did return to light employment following his carpal tunnel surgery and continued in that capacity until the time he was laid off on February 14, 1994.

Based on the **Guides to the Evaluation of Permanent Impairment** he would appear to have a 10% impairment of the whole person, according to the doctor.

The record also contains the October 7, 1986 report of Dr.

Hayes wherein the doctor states as follows (EX 30):

The above captioned patient was seen and examined at your request in my office on October 1, 1986 at which time he provided the following history.

He is a 36-year-old male previously employed as a burner/grinder at Electric Boat who, on October 27, 1981, was lifting plates up a ladder onto a hull and twisted and experienced an acute onset of lower back pain. In addition, he experienced an acute onset of neck stiffness. He reported the injury and was started on light duty. He came under the care of Dr. Bertini and underwent a period of rest, heat treatments and medications which continued for about two months.

He returned to work on full duty and continued for three or four days and was reinjured on January 5, 1982 after which he complained of increased neck and back pain.

He again came under the care of Dr. Bertini and was subsequently referred to Dr. Paul Bernstein who admitted him to Pawtucket Memorial Hospital in 1982 for a myelogram which the patient thinks showed some type of disc problem in his neck.

At the end of 1982, he returned to work in a light duty position and continued in that capacity until June 9, 1986. His work, during that period of time, consisted of working with plan books and involved some bending but no heavy lifting.

After June 9, 1986, no light (work) was available until early in September when he was notified that a light duty position was available as a “tank watch.” The patient states he doesn’t know what that meas and I certainly don’t know what it means either.

Presently, the patient is seeing Dr. Sowa for chiropractic manipulations of his neck and back twice weekly and complains of constant neck pain. He has had no recent diagnostic studies, such as a CT scan or EMG and has never undergone any surgical treatment.

At present, he complains of constant neck pain increased with motion and intermittent numbness and tingling in his right arm. He also complains of lower back pain with bending and states his neck pain increases with coughing or sneezing.

Physical examination showed a well-developed, well-nourished male who walked with a normal gait and who appeared in no particular discomfort or distress during the course of the examination. Examination of his neck showed bilateral paracervical muscle spasm and tenderness with a 50% restriction of forward flexion and rotatory motion. No neurological findings. His lower back showed mild paravertebral muscle tenderness without spasm and with more than 75% of normal forward and lateral flexion, negative

straight leg raising, negative Lasegue's signs and a negative neurological exam.

Impression and comments: It would appear from the history that this man has a chronic neck and back condition which has been minimally responsive over a long period of time to conservative treatment. At present, he has continued subjective findings which are supported by some objective, positive, physical findings.

I would consider him disabled for employment as a burner/grinder but certainly capable of a vast variety of light duty occupations which eliminate significant bending and lifting activities and which would not require him to do any work with his arms in an overhead position.

Assuming the job involved in "tank watch" confirms to these restrictions, then I think he would be capable of performing that occupation without any undue risk to his health, according to the doctor.

Dr. William J. Golini, a neurologist, sent the following letter on June 1, 1992 to Dr. Walter C. Cotter (EX 10):

Thank you very much for referring Kevin Day to me. He is, as you know, a 42-year-old gentleman who initially injured his neck and low back in 1982 while carrying metal plates up a ladder. He turned abruptly injuring his back and neck at that time. He has had cervical and lumbar pain over the years, and because of the injury he changed positions at work. In the recent past he has been using a stapling device quite regularly, and recently, in April of 1992, he injured his right hand with repetitive banging of the staple gun. He is complaining at this time of paresthesias and numbness in the second and third digits associated with achiness as well as pain and numbness intermittently in the first digit.

Past Medical History: Hist past medical history is otherwise unremarkable. He has no chronic illnesses and takes no medications regularly.

Clinical Examination: On clinical examination, the reflexes are full and symmetrical in both upper extremities. No proximal weakness is noted, however, he does report a decrement to the perception of pinprick over the lateral aspect of the right arm. There is a positive Tinel's sign at the right wrist with a sensory deficit to the perception of pinprick and touch in a median distribution in the right hand.

Nerve Conduction Studies: Nerve conduction studies were carried out in the right upper extremity. Nerve conductions, with attention to the right median and ulnar motor and sensory nerves as well as the corresponding F-wave latencies, demonstrates a mild carpal tunnel syndrome with a borderline right median motor distal

latency at 4.2 meters per second and a slowed median sensory conduction velocity at the third digit at 46.1 meters per second. The ulnar parameters were normal...

Impression: This gentleman presents with an electrically mild, right-sided carpal tunnel syndrome as well as a cervical radiculopathy. The cervical radiculopathy is mildly acute and chronic affecting the C6 nerve root, and I cannot rule out involvement of C5 and C7. The acute abnormalities are quite mild and circumscribed, however certainly present. The chronic abnormalities are more diffuse and generalized.

Clearly he has evidence both electrically and clinically for a carpal tunnel syndrome. It is unclear to me to what degree the radiculopathy is contributing to the picture. My inclination would be to at least initially treat him conservatively with wrist splints, and a course of cervical physical therapy may also be helpful, according to the doctor.

The record also contains the March 15, 1994 report of Dr. Neville Knuckey, a neurosurgeon, to Dr. Dubois (CX 15):

Thank you for asking me to see Mr. Day, a 44-year-old gentleman who has a benign past medical history. He had a carpal tunnel release in 1983.

The patient told me he was lifting heavy plates in 1982 while working for Electric Boat. He twisted and had an acute onset of low back pain. He was initially off work for 2 months. Since 1982, he has complained of chronic low back pain that is non-radicular. Cervical pain commenced at the time of the initial injury and it then slowly worsened. The cervical pain is located in the right neck region and radiates to the right shoulder. He does not complain of any distal right arm pain. He complains of mild weakness of the right arm but no paresthesia. The neck pain has been present for 14 years and is aggravated by working and driving. He does not complain of any lower limb weakness.

On examination today, his cranial nerves are normal. Cervical spine was diffusely tender and he had limitation of neck movements. Neurological examination of his upper limbs revealed no evidence of wasting, reflexes +1, power and sensation was normal. Neurological examination of his lower limbs was normal.

I reviewed the cervical MRI performed in 1994. It shows diffuse cervical spondylosis, but predominantly at C6, 7 there is a central disc herniation with compression of the subarachnoid space.

I discussed with the patient that since he has predominantly neck pain that surgical intervention, removal of the disc, is not likely to help his predominant symptom. I discussed with him that conservative treatment is in his best interest. I also outlined

the potential risk of acute spinal cord injury since he has mild cervical spondylosis, according to the doctor.

The record also contains the March 7, 2001 letter of Dr. William A. Wainright to the Employer's adjusting firm wherein the doctor states as follows (EX 8):

HISTORY: This patient is a 51-year-old man seen for Independent Medical Examination (sic). He states he is right-hand dominant. He gives a work history of being employed for 20-years at Electric Boat. He states he worked for 15 to 16 years as a burner-grinder. He spent an additional 4 to 5 years as a clerical workers. He was laid-off from Electric Boat at Quonset Point in 1994. While at Quonset Point in 1997 he began employment as a fiberoptic technician. His job involves installing fiberoptic cables. He has occasional use of air-powered wrenches. His height is about 5', 9". His weight is about 200-pounds. He denies any current smoking history. He did stop smoking in 1986. Prior to this he smoked an admitted 1-1/2 packs of cigarettes a day for 15 years. He denies any diabetes mellitus, thyroid disease or Lyme disease. He denies any systemic arthritis. He denies any gout or psoriasis. He does have a history of coronary artery disease. He had an angioplasty done in 1999. He is on multiple cardiovascular medications. He states he's had symptoms in both hands starting in 1992. As part of his clerical duties he worked in the plan room and he had to continually pull plans off the shelves and stamp them in and out of the office. He states this involved repetitive and somewhat heavy use of the upper extremities. He did use air-powered, vibrating tools while employed as a burner-grinder. As noted above, he has occasional use of air-powered, vibrating tools as a fiberoptic technician. He denies any specific injury to the hands or arms. He is status post release of his right carpal tunnel in 1993 by Dr. Dubois. His hobbies include fishing.

His medical records available for review begin with a report from Dr. Alessi dated October 31, 2000. Chief complaint was numbness and tingling in both hands. Nerve conduction studies were performed. Studies were normal. There was no electrical evidence of nerve damage. Electromyography was normal as well.

Vascular studies were performed at the William W. Backus Hospital on January 18, 2001. Numbness and cold sensitivity in the hands was noted. Digital brachial indices in all ten fingers were above 1.0. Pulse volume recordings in the digits showed good preservation of waveform. Initial finger temperatures were decreased. After warming ice water challenge was performed. At 15 minutes after ice water challenge temperature had recovered to above the post-warming temperatures.

The patient presents in our office today complaining of achy discomfort in both hands. He feels his hands are sensitive to cold temperatures as well. He has pain more in the left hand than in

the right extending up the forearm on the dorsal aspect. He notes occasional nighttime paresthesias in the hands. He feels his symptoms have been steadily increasing. He feels his left carpal tunnel release did help him for three to four years. He is having some discomfort in the hands when using a keyboard. He, upon direct questioning, admits to morning paresthesias and stiffness. Wrist flexed activities, such as driving, causes him achy discomfort...

IMPRESSION: 51-year-old man with 20-year work history at Electric Boat. Although his history varies he did spend part of his work time at Electric Boat as a grinder. He stated this was 10 years to Dr. Alessi. Today he states it was 15 to 16 years. The remaining he was employed as a clerical worker in the planning office. He does have complaints of numbness in the hands. He has physical findings consistent with peripheral nerve entrapment, worse on the right side than the left. His nerve conduction studies were normal. His symptoms have been increasing since 1992.

In my opinion, he does have a 5% impairment of the right hand, and a 3% impairment of the left hand due to peripheral nerve entrapment syndrome. I would apportion this from the onset of his symptoms in 1992 through his subsequent employment after leaving Electric Boat, including his current employment as a fiberoptic technician. He has some complaints of cold sensitivity in the hands. His physical exam shows no evidence of peripheral vascular disease. His vascular studies showed initial cold temperatures in the fingers, but excellent recovery after ice water challenge. This is somewhat difficult to explain, as the recovery after ice water challenge shows no evidence of vasospastic disease. In addition, his digital brachial indices were excellent in all digits. Perhaps initial warming time was inadequate, and this caused his initial cold temperatures in the digits. However, his temperatures were lower than normal initially.

Therefore, in my opinion, he does have a 4% impairment of each hand due to presumed vibratory white finger disease.

His injuries are more likely than not related to the use of his hands at Electric Boat, although, as mentioned above, his impairment for peripheral nerve entrapment syndrome should be apportioned from 1992 onward.

His impairment for hand/arm vibration syndrome and vibratory white finger disease is due to the use of air-powered tools while employed at Electric boat. He has used occasional air-powered wrenches after leaving Electric Boat. This has contributed to any vibratory white finger disease as well.

He does not need work restrictions at the current time.

No pre-existing conditions are identified making his current

problem materially and substantially worse.

His ratings are given using the **AMA Guides**, according to the doctor.

The record also contains the August 6, 1992 letter from Dr. Lawrence W. Lee, an orthopedic surgeon, to the Employer's adjusting firm (EX 14):

WORK HISTORY: Mr. Day is a 42-year-old right-hand dominant white male who has been an OFFICE WORKER at Electric Boat for ten years. He works in an office preparing packets of documents. He previously did the heavy work of burner/grinder for eight to nine years up until he sustained a neck and back injury resulting in his conversion to office work. He is not out of work at this time.

REPORTED HISTORY: In late 1991, he patient was doing frequent, forceful stapling using the right palm. He noted pain and swelling in the hand with accompanying occasional night pain and associated pain and difficulty with flexion, primarily at the index and middle fingers and throbbing of the wrist. The patient began seeing a neurosurgeon, Dr. Cotter. MRI's demonstrated herniated nucleus pulposus at C5-6 and C6-7. He was treated with Tylenol and Codeine. No braces or antiinflammatories have apparently been prescribed. After seeing the MRI, Dr. Cotter recommended cervical diskectomy.

Subsequently, it was felt that he also had problems, associated with carpal tunnel syndrome. Electrodiagnostic studies were performed by Dr. Golini on June 1, 1992. These demonstrated mild right carpal tunnel syndrome and cervical radiculopathy, both with acute and chronic changes in C-6 root and possibly also C5-7. Dr. Cotter subsequently recommends carpal tunnel release.

CURRENT COMPLAINTS: The patient continues to have pain and numbness in the right hand.

PAST HISTORY: Previous injury in 1982 of cervical disc herniation.

PHYSICAL EXAMINATION: On examination, the patient is a 5'9" tall 190 pound white male...

DIAGNOSIS: Cervical radiculopathy with possible double crush carpal tunnel syndrome, right.

ASSESSMENT: This patient has sustained two injuries: an initial cervical spine injury approximately ten years ago and more recent injury in the region of the right hand.

While his work up to this point has been reasonable, his treatment I believe has been inadequate. Recommendations for surgery are premature. I think it highly likely that in view of evidence of

both acute and chronic cervical radiculopathy, that the patient's more distal symptoms are probably a combination of radiating symptoms and possible double crush phenomenon with relatively mild pathology distally.

The patient has not had reasonable trial of conservative treatment and certainly warrants injection of the carpal tunnel region and flexor wrist region in an effort to predict the impact the carpal tunnel release would have on his overall condition.

In addition, he might well benefit from physical therapy, including modalities in stretching of the neck with cervical traction.

It is my opinion that the patient does have a mild carpal tunnel syndrome, but this is again probably a reflection of a double crush phenomenon. In any case, both recent exacerbation and injury ten years ago are causally related to work injuries.

Based on the patient's clinical examination and history, I would again recommend against early surgery and recommend aggressive conservative treatment of both cervical spine and carpal tunnel regions before progressing with surgery, according to the doctor.

The record also contains the February 3, 1995 letter from Dr. A. Louis Mariorenzi, an orthopedic surgeon, to the Employer's adjusting firm wherein the doctor states as follows (EX 34):

Occupation: Burner/Grinder

CHIEF COMPLAINT: Injury to the neck, lower back and right hand.

HISTORY: This 45-year-old male states that while employed by General Dynamics he injured his lower back in 1982. He apparently subsequent to that injury returned to gainful employment sometime in the 1982 or 1983 at light work. He apparently continued doing light work until 1992 when in April in the process of lifting files he noted pain in the neck. He describes the pain as acute in onset, he states the pain was severe. He noted almost immediate loss of function to the arm. On the following day because of persistent pain and arm discomfort he was seen by Dr. Bertini and apparently remains under his care and is continuing to be evaluated by him at two month intervals. He has also in the past been seen and treated by Dr. Cotter and has had some EMGs by Dr. Golini. The patient has also in the past had some MRI's, physical therapy but has never been treated at the John Donley Center. He presently takes no medication except for aspirin on a p.r.n. basis for his discomfort. He presently complains of stiffness in the cervical area which he describes as constant. He complains of pain in the right shoulder which he states radiates down the right arm. He also states when he looks up his neck seems to jam.

With reference to the lower back he describes the pain as constant

in nature, aching aggravated by prolonged sitting and standing, severe with any attempt to carry on physical activity particularly when trying to work on his car the pain is very uncomfortable. He in the past has worn a back support. He does not wear it at the present time. Apparently following his injury in 1992 he did eventually return to gainful employment and continued working until findings in the recumbent position were noted to be present. His leg lengths were equal. there was no measurable atrophy in the thighs or calfs. Sensory examination was normal. Toe extensors and flexors manifested no weakness. Clonus and Babinski's were absent.

XRAYS: No xrays were taken at the time of this evaluation. MRI of the cervical area done at the Landmark Medical Center dated February 12, 1992 was reviewed by me. There was a central defect at the C6/7 level. There was some indentation of the thecal sac. There was no pressure on the cord and the neural foramen were patent. There was some calcification within the posterior walls problem. There was noted to be some degenerative changes at C5/6, C4/5 and C3/4 with osteophytic spur formation. No evidence of specific disc herniation was detected and there was no evidence of nerve root entrapment. These findings as reviewed by me compare favorably with a MRI report dated 2/3/94 which was done at Pawtucket Memorial Hospital at which time this was compared to the MRI that I reviewed and no changes were noted to be present.

IMPRESSION: Cervical strain with full recovery.

DISCUSSION: This patient at the present time in my opinion as a result of his April 1, 1992 injury suffered an acute cervical strain. It is my opinion that from this injury he has made a full and complete recovery. No functional impairment has resulted from this injury. This patient's history is somewhat confusing. He states, in the history obtained at that time, that back in 1982 he injured his lower back and was treated for that condition. His medical records would indicate that he injured his lower back but later developed neck problems and was seen and evaluated by Dr. Bernstein. Although no specific diagnostic studies dating back to 1982 were available there is a note stating that he suffered a herniated disc in the cervical area. If this be the case then it is my opinion without a doubt that this patient suffered the herniated disc at the C6/7 level back in 1982. Based on a review of his medical records he was seen by Dr. Cotter prior to April of 1992 for neck symptoms and actually was having a significant amount of difficulty that in February 1992 an MRI was requested. At the present time his physical findings revealed no evidence of any active ongoing herniated disc in the cervical area but are more consistent with advanced degenerative arthritis throughout the cervical area. Also review of his medical records would indicate that the MRI done in February 1992 is essentially identical to that done in February 1994 so certainly one can safely conclude that the pre-existed problem certainly was not made worse or aggravated by

his 1992 occupational injury. Using the **AMA Guidelines** this patient does have a permanent partial impairment because of the changes in the cervical area and this would be equal to a 4% permanent partial impairment of the whole person. This patient's present problem is primarily due to degenerative changes within the cervical area. These degenerative changes had made his occupational injury substantially worse and his present problems I believe are primarily due to the degenerative arthritis in the cervical area, the herniated disc having resolved itself.

PROGNOSIS: The patient's prognosis is satisfactory. A permanent partial impairment as stated above has resulted.

ABILITY TO WORK: At the present time with reference to this patient's occupational injury, specifically that of 1992, he is capable of return to full and gainful employment with no restrictions and no limitations. Also in view of his 1992 occupational injury, if he did suffer a herniated disc at that time, he has recovered. He has a minimal permanent partial impairment and this degree of impairment should not restrict him from his former type of work.

CAUSAL RELATIONSHIP: The occupational injury of 1994 was an acute neck strain from which he has made a full and complete recovery. The occupational injury of 1992 may or may not have been a herniated disc in the cervical area and from that on conservative treatment he has made an excellent recovery with only a minimal permanent partial impairment. His present carpal tunnel problem has also resolved itself and no impairment has resulted, according to the doctor.

As of March 10, 1995, Dr. Mariorenzi states as follows (EX 34 at 4):

In response to your letter dated February 17, 1995 with reference to my medical evaluation of Kevin Day which was done on January 30, 1995, I have reviewed this medical record at the present time. A review of this record would indicate some typographical errors which I would like to correct. On the portion of the report entitled "ability to work", fourth line down beginning with the work also the date should be changed to 1982 and not 1992. On the paragraph entitled "causal relationship" the first line the occupational injury of 1994 should read the occupational injury of 1992. On the third line, sentence beginning "the occupational injury" should read 1982 and not 1992. These corrections having been made it is my medical opinion that at the time that I evaluated this patient he had a satisfactory recovery from his 1982 occupational injury he had at that time reached maximum medical improvement and it was my opinion he had a 4% permanent partial impairment resulting from the 1982 occupation injury which was assumed to be a herniated disc at the C6/7 level, treated conservatively and resolved. This permanent partial rating was

obtained from the **AMA Guidelines**, fourth edition, according to the doctor.

As of June 6, 1995, Dr. Richard G. Bertini stated as follows (EX 22):

The following is a supplementary report on the above captioned patient:

This patient was last evaluated by me on 4/21/95. He is considered partially disabled (light-medium classification) and may perform work activities that do not place physical stress on his neck and lower back. Working in tight, cramped areas and bending, stooping and heavy lifting are contraindicated.

Noteworthy is the August 29, 1995 progress note from Dr. Bertini wherein the doctor reports as follows (EX 37):

"Symptoms in the cervical and lumbar areas persist as well as in his hands. No paraesthesias noted. There is guarded and restricted neck and low back motion at the extremes. Pulses palpable and there is no sensory deficit. There may be some weakness of grasp on the right. He has improved from the right carpal tunnel surgery. He states that he would like to be discharged and will return if symptoms worsen. Discharged."

Claimant testified that although those symptoms persisted, he requested that Dr. Bertini grant him that medical discharge **solely so that he could settle his claim against the Employer under the Rhode Island state compensation statute.**

On the basis of the totality of this record and having observed the demeanor and heard the testimony of a most credible Claimant, I make the following:

Findings of Fact and Conclusions of Law

This Administrative Law Judge, in arriving at a decision in this matter, is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and he is not bound to accept the opinion or theory of any particular medical examiner. **Banks v. Chicago Grain Trimmers Association, Inc.**, 390 U.S. 459 (1968), **reh. denied**, 391 U.S. 929 (1969); **Todd Shipyards v. Donovan**, 300 F.2d 741 (5th Cir. 1962); **Scott v. Tug Mate, Incorporated**, 22 BRBS 164, 165, 167 (1989); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Anderson v. Todd Shipyard Corp.**, 22 BRBS 20, 22 (1989); **Hughes v. Bethlehem Steel Corp.**, 17 BRBS 153 (1985); **Seaman v. Jacksonville Shipyard, Inc.**, 14 BRBS 148.9 (1981); **Brandt v. Avondale Shipyards, Inc.**, 8 BRBS 698 (1978); **Sargent v. Matson Terminal, Inc.**, 8 BRBS 564 (1978).

The Act provides a presumption that a claim comes within its provisions. **See** 33 U.S.C. §920(a). This Section 20 presumption "applies as much to the nexus between an employee's malady and his employment activities as it does to any other aspect of a claim." **Swinton v. J. Frank Kelly, Inc.**, 554 F.2d 1075 (D.C. Cir. 1976), **cert. denied**, 429 U.S. 820 (1976). Claimant's uncontradicted credible testimony alone may constitute sufficient proof of physical injury. **Golden v. Eller & Co.**, 8 BRBS 846 (1978), **aff'd**, 620 F.2d 71 (5th Cir. 1980); **Hampton v. Bethlehem Steel Corp.**, 24 BRBS 141 (1990); **Anderson v. Todd Shipyards**, **supra**, at 21; **Miranda v. Excavation Construction, Inc.**, 13 BRBS 882 (1981).

However, this statutory presumption does not dispense with the requirement that a claim of injury must be made in the first instance, nor is it a substitute for the testimony necessary to establish a "**prima facie**" case. The Supreme Court has held that "[a] **prima facie** 'claim for compensation,' to which the statutory presumption refers, must at least allege an injury that arose in the course of employment as well as out of employment." **United States Indus./Fed. Sheet Metal, Inc., v. Director, Office of Workers' Compensation Programs, U.S. Dep't of Labor**, 455 U.S. 608, 615 102 S. Ct. 1318, 14 BRBS 631, 633 (CRT) (1982), **rev'g Riley v. U.S. Indus./Fed. Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). Moreover, "the mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer." U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers' Compensation Programs, U.S. Department of Labor, 455 U.S. 608, 102 S.Ct. 1318 (1982), **rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). The presumption, though, is applicable once claimant establishes that he has sustained an injury, **i.e.**, harm to his body. **Preziosi v. Controlled Industries**, 22 BRBS 468, 470 (1989); **Brown v. Pacific Dry Dock Industries**, 22 BRBS 284, 285 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56, 59 (1985); **Kelaita v. Triple A. Machine Shop**, 13 BRBS 326 (1981).

To establish a **prima facie** claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that (1) the claimant sustained physical harm or pain and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. **Kelaita**, **supra**; **Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984). Once this **prima facie** case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. To rebut the presumption, the party opposing entitlement must present substantial evidence proving the absence of or severing the connection between such harm and employment or working conditions. **Kier**, **supra**; **Parsons Corp. of California v. Director, OWCP**, 619 F.2d 38 (9th Cir. 1980); **Butler v. District Parking Management Co.**, 363 F.2d 682 (D.C. Cir. 1966); **Ranks v.**

Bath Iron Works Corp., 22 BRBS 301, 305 (1989). Once claimant establishes a physical harm and working conditions which could have caused or aggravated the harm or pain the burden shifts to the employer to establish that claimant's condition was not caused or aggravated by his employment. **Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. **Del Vecchio v. Bowers**, 296 U.S. 280 (1935); **Volpe v. Northeast Marine Terminals**, 671 F.2d 697 (2d Cir. 1981). In such cases, I must weigh all of the evidence relevant to the causation issue. **Sprague v. Director, OWCP**, 688 F.2d 862 (1st Cir. 1982); **MacDonald v. Trailer Marine Transport Corp.**, 18 BRBS 259 (1986).

To establish a **prima facie** case for invocation of the Section 20(a) presumption, claimant must prove that (1) he suffered a harm, and (2) an accident occurred or working conditions existed which could have caused the harm. **See**, **e.g.**, **Noble Drilling Company v. Drake**, 795 F.2d 478, 19 BRBS 6 (CRT) (5th Cir. 1986); **James v. Pate Stevedoring Co.**, 22 BRBS 271 (1989). If claimant's employment aggravates a non-work-related, underlying disease so as to produce incapacitating symptoms, the resulting disability is compensable. **See Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986); **Gardner v. Bath Iron Works Corp.**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981). If employer presents "specific and comprehensive" evidence sufficient to sever the connection between claimant's harm and his employment, the presumption no longer controls, and the issue of causation must be resolved on the whole body of proof. **See**, **e.g.**, **Leone v. Sealand Terminal Corp.**, 19 BRBS 100 (1986).

Employer contends that Claimant did not establish a **prima facie** case of causation and, in the alternative, that there is substantial evidence of record to rebut the Section 20(a), 33 U.S.C. §920(a), presumption. I reject both contentions. The Board has held that credible complaints of subjective symptoms and pain can be sufficient to establish the element of physical harm necessary for a **prima facie** case for Section 20(a) invocation. **See Sylvester v. Bethlehem Steel Corp.**, 14 BRBS 234, 236 (1981), **aff'd**, 681 F.2d 359, 14 BRBS 984 (5th Cir. 1982). Moreover, I may properly rely on Claimant's statements to establish that he experienced a work-related harm, and as it is undisputed that a work accident occurred which could have caused the harm, the Section 20(a) presumption is invoked in this case. **See**, **e.g.**, **Sinclair v. United Food and Commercial Workers**, 23 BRBS 148, 151 (1989). Moreover, Employer's general contention that the clear weight of the record evidence establishes rebuttal of the pre-presumption is not sufficient to rebut the presumption. **See generally Miffleton v. Briggs Ice Cream Co.**, 12 BRBS 445 (1980).

The presumption of causation can be rebutted only by "substantial evidence to the contrary" offered by the employer. 33

U.S.C. § 920. What this requirement means is that the employer must offer evidence which negates the connection between the alleged event and the alleged harm. In **Caudill v. Sea Tac Alaska Shipbuilding**, 25 BRBS 92 (1991), the carrier offered a medical expert who testified that an employment injury did not "play a significant role" in contributing to the back trouble at issue in this case. The Board held such evidence insufficient as a matter of law to rebut the presumption because the testimony did not completely rule out the role of the employment injury in contributing to the back injury. **See also Cairns v. Matson Terminals, Inc.**, 21 BRBS 299 (1988) (medical expert opinion which did entirely attribute the employee's condition to non-work-related factors was nonetheless insufficient to rebut the presumption where the expert equivocated somewhat on causation elsewhere in his testimony). Where the employer/carrier can offer testimony which negates the causal link, the presumption is rebutted. **See Phillips v. Newport News Shipbuilding & Dry Dock Co.**, 22 BRBS 94 (1988) (medical testimony that claimant's pulmonary problems are consistent with cigarette smoking rather than asbestos exposure sufficient to rebut the presumption).

For the most part only medical testimony can rebut the Section 20(a) presumption. **But see Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989) (holding that asbestosis causation was not established where the employer demonstrated that 99% of its asbestos was removed prior to the claimant's employment while the remaining 1% was in an area far removed from the claimant and removed shortly after his employment began). Factual issues come in to play only in the employee's establishment of the **prima facie** elements of harm/possible causation and in the later factual determination once the Section 20(a) presumption passes out of the case.

Once rebutted, the presumption itself passes completely out of the case and the issue of causation is determined by examining the record "as a whole". **Holmes v. Universal Maritime Services Corp.**, 29 BRBS 18 (1995). Prior to 1994, the "true doubt" rule governed the resolution of all evidentiary disputes under the Act; where the evidence was in equipoise, all factual determinations were resolved in favor of the injured employee. **Young & Co. v. Shea**, 397 F.2d 185, 188 (5th Cir. 1968), **cert. denied,** 395 U.S. 920, 89 S. Ct. 1771 (1969). The Supreme Court held in 1994 that the "true doubt" rule violated the Administrative Procedure Act, the general statute governing all administrative bodies. **Director, OWCP v. Greenwich Collieries**, 512 U.S. 267, 114 S. Ct. 2251, 28 BRBS 43 (CRT) (1994). Accordingly, after **Greenwich Collieries** the employee bears the burden of proving causation by a preponderance of the evidence after the presumption is rebutted.

As the Employer disputes that the Section 20(a) presumption is invoked, **see Kelaita v. Triple A Machine Shop**, 13 BRBS 326 (1981), the burden shifts to employer to rebut the presumption with substantial evidence which establishes that claimant's employment

did not cause, contribute to, or aggravate his condition. **See Peterson v. General Dynamics Corp.**, 25 BRBS 71 (1991), **aff'd sub nom. Insurance Company of North America v. U.S. Dept. of Labor**, 969 F.2d 1400, 26 BRBS 14 (CRT)(2d Cir. 1992), **cert. denied,** 507 U.S. 909, 113 S. Ct. 1264 (1993); **Obert v. John T. Clark and Son of Maryland,** 23 BRBS 157 (1990); **Sam v. Loffland Brothers Co.**, 19 BRBS 228 (1987). The unequivocal testimony of a physician that no relationship exists between an injury and a claimant's employment is sufficient to rebut the presumption. **See Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984). If an employer submits substantial countervailing evidence to sever the connection between the injury and the employment, the Section 20(a) presumption no longer controls and the issue of causation must be resolved on the whole body of proof. **Stevens v. Tacoma Boatbuilding Co.**, 23 BRBS 191 (1990). This Administrative Law Judge, in weighing and evaluating all of the record evidence, may place greater weight on the opinions of the employee's treating physician as opposed to the opinion of an examining or consulting physician. In this regard, **see Pietrunti v. Director, OWCP**, 119 F.3d 1035, 31 BRBS 84 (CRT)(2d Cir. 1997). **See also Amos v. Director, OWCP,** 153 F.3d 1051 (9th Cir. 1998), **amended,** 164 F.3d 480, 32 BRBS 144 (CRT) (9th Cir. 1999), **cert. denied**, 120 S.Ct. 40 (1999).

In the case **sub judice**, Claimant alleges that the harm to his bodily frame, **i.e.**, his cervical, lumbar and bilateral hand/arm problems, resulted from working conditions at the Employer's shipyard. The Employer has introduced no evidence severing the connection between such harm and Claimant's maritime employment. Thus, Claimant has established a **prima facie** claim that such harm is a work-related injury, as shall now be discussed.

Injury

The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury. **See** 33 U.S.C. §902(2); **U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers Compensation Programs, U.S. Department of Labor**, 455 U.S. 608, 102 S.Ct. 1312 (1982), **rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). A work-related aggravation of a pre-existing condition is an injury pursuant to Section 2(2) of the Act. **Gardner v. Bath Iron Works Corporation**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385 (1st Cir. 1981); **Preziosi v. Controlled Industries**, 22 BRBS 468 (1989); **Januszewicz v. Sun Shipbuilding and Dry Dock Company**, 22 BRBS 376 (1989) (**Decision and Order on Remand**); **Johnson v. Ingalls Shipbuilding**, 22 BRBS 160 (1989); **Madrid v. Coast Marine Construction**, 22 BRBS 148 (1989). Moreover, the employment-related injury need not be the sole cause, or primary factor, in a disability for compensation purposes. Rather, if an employment-related injury contributes to, combines with or aggravates a pre-existing disease or underlying condition, the entire resultant disability is compensable. **Strachan Shipping v. Nash**, 782 F.2d 513 (5th Cir. 1986); **Independent Stevedore Co. v. O'Leary**, 357 F.2d 812 (9th Cir. 1966); **Kooley v. Marine Industries Northwest**, 22 BRBS 142 (1989); **Mijangos v. Avondale Shipyards, Inc.**, 19 BRBS 15 (1986); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). Also, when claimant sustains an injury at work which is followed by the occurrence of a subsequent injury or aggravation outside work, employer is liable for the entire disability if that subsequent injury is the natural and unavoidable consequence or result of the initial work injury. **Bludworth Shipyard, Inc. v. Lira**, 700 F.2d 1046 (5th Cir. 1983); **Mijangos**, **supra**; **Hicks v. Pacific Marine & Supply Co.**, 14 BRBS 549 (1981). The term injury includes the aggravation of a pre-existing non-work-related condition or the combination of work- and non-work-related conditions. **Lopez v. Southern Stevedores**, 23 BRBS 295 (1990); **Care v. WMATA**, 21 BRBS 248 (1988).

In occupational disease cases, there is no "injury" until the accumulated effects of the harmful substance manifest themselves and claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should become have been aware, of the relationship between the employment, the disease and the death or disability. **Travelers Insurance Co. v. Cardillo**, 225 F.2d 137 (2d Cir. 1955), **cert. denied**, 350 U.S. 913 (1955). **Thorud v. Brady-Hamilton Stevedore Company, et al.**, 18 BRBS 232 (1987); **Geisler v. Columbia Asbestos, Inc.**, 14 BRBS 794 (1981). Nor does the Act require that the injury be traceable to a definite time. The fact that claimant's injury occurred gradually over a period of time as a result of continuing exposure to conditions of employment

is no bar to a finding of an injury within the meaning of the Act. **Bath Iron Works Corp. v. White**, 584 F.2d 569 (1st Cir. 1978).

This closed record conclusively establishes, and I so find and conclude, that Claimant's lumbar, cervical and bilateral hand/arm problems were directly caused by his maritime employment at the Employer's maritime facility, that the date of his injury is April 1, 1992, that the Employer had timely notice of such injury, that the Employer timely filed the appropriate injury report(EX 39-1) and that Claimant filed a claim for benefits once a dispute arose between the parties. (CX 1) The crucial issue in this case is whether Claimant timely filed for benefits, an issue I shall now resolve.

Statute of Limitations

Section 13(a) provides that the right to compensation for disability or death resulting from a traumatic injury is barred unless the claim is filed within one (1) year after the injury or death or, if compensation has been paid without an award, within one (1) year of the last payment of compensation. The statute of limitations begins to run only when the employee becomes aware of the relationship between his employment and his disability. An employee becomes aware of this relationship if a doctor discusses it with him. **Aurelio v. Louisiana Stevedores**, 22 BRBS 418 (1989). The 1984 Amendments to the Act have changed the statute of limitations for a claimant with an occupational disease. Section 13(b)(2) now requires that such claimant file a claim within two years after claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have become aware, of the relationship among his employment, the disease, and the death or disability. **Osmundsen v. Todd Pacific Shipyards**, 755 F.2d 730 (9th Cir. 1985), and the Board's **Decision and Order on Remand** at 18 BRBS 112 (1986); **Manders v. Alabama Dry Dock & Shipbuilding**, 23 BRBS 19 (19889). Furthermore, pertinent regulations state that, for purposes of occupational diseases, the respective notice and filing periods do not begin to run until the employee is disabled or, in the case of a retired employee, until a permanent impairment exists. **Lombardi v. General Dynamics Corp.**, 22 BRBS 323, 326 (1989); **Curit v. Bath Iron Works Corp.**, 22 BRBS 100 (1988); **Lindsay v. Bethlehem Steel Corporation**, 18 BRBS 20 (1986); 20 C.F.R. §702.212(b) and §702.222(c).

The Benefits Review Board has discussed the pertinent elements of an occupational disease in **Gencarelle v. General Dynamics Corp.**, 22 BRBS 170 (1989), **aff'd**, 892 F.2d 173, 23 BRBS 13 (CRT) (2d Cir. 1989).

It is well-settled that the employer has the burden of establishing that the claim was not timely filed. 33 U.S.C. §920(b); **Fortier v. General Dynamics Corporation**, 15 BRBS 4 (1982),

appeal dismissed sub nom. Insurance Company of North America v. Benefits Review Board, 729 F.2d 1441 (2d Cir. 1983).

Section 13(d) specifies that the one (1) year statute of limitations is tolled by the pendency of a state workers' compensation claim. **Ingalls Shipbuilding Division, Litton Systems, Inc. v. Hollinhead**, 571 F.2d 272 (5th Cir. 1978); **Smith v. Universal Fabricators**, 21 BRBS 83 (1988), **aff'd**, 878 F.2d 843, 22 BRBS 104 (CRT) (5th Cir. 1989); **Calloway v. Zigler Shipyards, Inc.**, 16 BRBS 175 (1984); **Saylor v. Ingalls Shipbuilding**, 9 BRBS 561 (1978); **George v. Lykes Bros.**, 7 BRBS 877 (1978); **McCabe v. Ball Builders, Inc.**, 1 BRBS 290 (1975). The burden of establishing the elements of Section 13(d) is on the claimant. **George**, **supra**, at 880. I find and conclude that Claimant has sustained his burden on this issue. The mistaken filing of a claim under a state workers' compensation law constituted a suit for damages within the meaning of Section 13(d) and thus tolled the Section 13(a) one (1) year statute of limitations.

Section 13(a) must be read in conjunction with the reporting requirements of the Act and such issue will now be discussed.

Section 30

Section 30(a) of the Act provides that within ten (10) days from the date of any injury which causes loss of one or more shifts of work (a requirement added by the 1984 Amendments), or death or from the date that the employer has knowledge of a disease or infection in respect of such injury, the employer shall send to the Secretary of Labor and to the appropriate Deputy Commissioner a first injury report (Form LS-202) containing the pertinent information about such injury or death. **Aurelio v. Louisiana Stevedores**, 22 BRBS 418 (1989); **Paquin v. General Dynamics Corp.**, 4 BRBS 383 (1976). Section 30(f) provides that where the employer or the carrier has been given notice, or the employer (or his agent in charge of the business in the place where the injury occurred) or the carrier has knowledge, of any injury or death of any employee, and fails, neglects, or refuses to file the appropriate report required by Section 30(a), the statute of limitations of Section 13(a) shall not begin to run against the claim of the injured employee or his dependents entitled to compensation, or in favor of either the employer or the carrier, until such report has been filed with the Secretary and/or the Deputy Commissioner. **See** 20 C.F.R. §702.205. Section 30(f) should be read in conjunction with the three subsections of Section 12(d) and the definitions of employer knowledge and the several reasons whereby the failure to give timely notice may be excused by this Administrative Law Judge.

The Benefits Review Board has consistently held that knowledge by the employer that one of its employees has sustained an injury

is sufficient to constitute knowledge under Section 30(f). However, an employer's awareness of the general hazards at the place of employment is insufficient to put an employer on notice of an injury to a specific employee as required by the Act. **Sun Shipbuilding & Dry Dock Co. v. McCabe**, 593 F.2d 234 (3d Cir. 1979); **Sun Shipbuilding & Dry Dock Co. v. Bowman**, 507 F.2d 146 (3d Cir. 1975); **Gencarelle v. General Dynamics**, 22 BRBS 170 (1989), **aff'd** 892 F.2d 173, 23 BRBS 13 (CRT) (2d Cir. 1989); **Pryor v. James McHugh Construction Company**, 18 BRBS 273 (1986). Moreover, lack of education or sophistication does not constitute an excuse within the meaning of Section 12(d)(2). **Arcus v. Sun Shipbuilding and Dry Dock Co.**, 16 BRBS 34, 37 (1983).

Under Sections 12(d)(1), (2) and (3) of the Act, failure to give proper written notice under Section 12(a) will not bar a claim if the employer had knowledge of the injury during the filing period or the administrative law judge determines that employer has not been prejudiced by failure to give timely notice. 33 U.S.C. §§912(d)(1) and (d)(2). **Noack v. Zidell Explorations**, 17 BRBS 36 (1985); **McQuillen v. Horne Brothers, Inc.**, 16 BRBS 10 (1983). **See also** 20 C.F.R. §702.216, effective January 31, 1986, which provides that this Administrative Law Judge may excuse such failure to give notice in those situations where "for some satisfactory reason such notice could not be given." **Sheek v. General Dynamics Corp.**,18 BRBS 11 (1985), **Decision and Order on Reconsideration**, 18 BRBS 151, 153 (1986).

The Section 12(d)(1) requirement that the employer have "knowledge" of the injury requires, generally, that the employer have knowledge of the injury and its relationship to the employee's work. **Sun Shipbuilding & Dry Dock Co. v. Walker**, 590 F.2d 73 (3d Cir. 1978), **rev'g** 7 BRBS 134 (1977) (where the employee had certified on a group hospital benefits form that his injury was not work-related); **Strachan Shipping Co. v. Davis**, 571 F.2d 968 (5th Cir. 1978); **Sun Shipbuilding & Dry Dock Co. v. Bowman,** 507 F.2d 146 (3d Cir. 1975). In appropriate cases, knowledge of an employee's work-related injury may be imputed to the employer where the record indicates that the employer knew of the injury and had facts that would lead a reasonable person to conclude that compensation liability is possible so that further investigation into the matter is warranted. **Sheek v. General Dynamics Corp.**, 18 BRBS 1 (1985), **Decision and Order on Reconsideration**, 18 BRBS 151 (1986). **See also, Addison v. Ryan-Walsh Stevedoring Company**, 22 BRBS 32 (1989); **Matthews v. Jeffboat**, 18 BRBS 185 (1986); **Mattox v. Sun Shipbuilding and Dry Dock Company**, 15 BRBS 162 (1982).

The Board has construed the Section 12(d)(1) exception in a narrow fashion. **See, e.g., Carlow v. General Dynamics Corp.**, 15 BRBS 115 (1982). However, knowledge may be imputed to the employer under certain circumstances. **Voris v. Eikel**, 346 U.S. 328 (1953). In **Voris**, an illiterate employee was injured in a flash fire on a ship, and knowledge was imputed to the employer where both the

working foreman and gang foreman knew of the injury. In **Voris**, the court considered it significant that the accepted practice was for the injured employee to report his injury to his immediate supervisor. **See also Perkins v. Marine Terminal Corp.**, 16 BRBS 84 (1984).

Failure to give timely notice has been excused, pursuant to Section 12(d)(2), in circumstances such as where both claimant and his physicians were unsure as to the relationship between the injury and the employment. **See Jordan v. General Dynamics Corp.**, 4 BRBS 201 (1976); **Shillington v. W.J. Jones & Son, Inc.**, 1 BRBS 191 (1974), and where claimant lacked knowledge of his employer's identity and could not locate the person who hired him. **Johnson v. Treyja, Inc.**, 5 BRBS 464 (1977). **See also Jasinskas v. Bethlehem Steel Corp.**, 735 F.2d 1, 16 BRBS 95 (CRT) (1st Cir. 1984), **vacating and remanding** 15 BRBS 367 (1983).

As noted above, this matter involves a claim filed pursuant to the provisions of the Longshore Act. Claimant is seeking total disability benefits from April 1, 1992 through April 5, 1994 and either permanent and total disability, or permanent partial disability benefits from April 6, 1994 through the present and continuing for his neck and back injuries. He is also seeking permanent partial disability benefits pursuant to Section 8(c)(3) for work-related hand/arm vibration syndrome (HAVS) and medical benefits.

The primary issue is the timeliness of all the claims. The Claimant acknowledged that he was paid weekly and a lump sum settlement under the Rhode Island Workers' Compensation Act (hereinafter the "State Act") on November 20, 1995 for injuries to his back, neck and hands/arms. The injury dates were identified as October 27, 1981 and April 1, 1992. The Respondent, Electric Boat, maintains that this claim is untimely pursuant to Section 13(a) as it was not filed within the one-year limitation period. Alternatively, if this claim is not barred, the Claimant has an earning capacity of $435.00 per week. This is the 1992 equivalent to his post-injury wages, according to the Employer.

The Employer submits that the claim for compensation filed herein, dated August 17, 2000 (CX 1), does not satisfy the requirements of Section 13(a). I agree for the following reasons.

In the case at hand, Claimant accepted a lump sum settlement in 1995 for all injuries arising out of the October 27, 1981 and April 1, 1992 events. This settlement included injuries to his back, neck and bilateral carpal tunnel. Thus, as he did not file his claim herein within one year of that 1995 settlement, he is not entitled to any additional compensation benefits herein, and I so find and conclude.

I also note that Claimant did not file any medical reports with the District Director since the lump sum payment was made by Electric Boat under the State Act. The Claimant's own testimony at trial established that he did not seek medical treatment for his back, neck, or hands since settlement of his state claim in 1995. (TR 51) In fact, he was discharged from the care of Dr. Richard Bertini on August 29, 1995. (EX 37)

I also find and conclude that this case is distinguishable from **Plourde v. Bath Iron Works Corporation**, 34 BRBS 45 (2000). In **Plourde**, the claimant signed a consent decree dismissing the state proceeding. The claimant would no longer receive state benefits since a Longshore claim had been filed. The Administrative Law Judge could not apply collateral estoppel and preclude the claimant from relitigating the issue of disability. Here, Mr. Day did not litigate his state claim and therefore, collateral estoppel is not an issue.

The First Circuit in **Bath Iron Works v. Director, OWCP**, 125 F.3d 18, 23-24 (1997), a matter over which this Administrative Law Judge presided, expressed some doubts in dictum regarding the holding in **Ingalls Shipbuilding, Inc. v. Hollinhead**, 571 F.2d 272 (5th Cir. 1978), which allows filing a pendency of a state compensation claim to toll the statute of limitations pursuant to Section 13(d).

Lastly, the Claimant in the present case became aware of the relationship between his injury and his employment when he filed his claim under the State Act. Claimant argues that the claim is timely because the Employer's LS 202 was deficient since it did not include injuries to his neck and back. The LS 202 form dated April 1, 1992 indicates that the Claimant sustained only a right hand injury and not an aggravation to his low back and cervical condition. Employer submitted Form LS 210 for the April 1, 1992 injury to the OWCP on July 21, 1992. (EX 39-1)

Even if the LS 202 is determined to be deficient, Claimant was aware of the full extent of his cervical injury and how it affected his wage-earning capacity when he filed his claim under the State Act. This satisfies the awareness requirement pursuant to Section 13(a). Injuries to his back, neck, and carpal tunnel sustained on October 27, 1981 and April 1, 1992 were included in the Workers' Compensation Petition For Commutation. (EX 18)

Claimant was aware of the full extent of all his injuries when he filed his State claim and while it was pending or, at the latest, that date the claim was finally settled in November, 1995. Claimant had one year from that time to file a claim under the Act. As a result, this claim is barred under Section 13(a), and I so find and conclude.

However, in the event that reviewing authorities should hold, as a matter of law, that the claim herein satisfies the requirements of Section 13 of the Act, I shall now resolve the remaining issues for the future guidance of the parties.

Nature and Extent of Disability

It is axiomatic that disability under the Act is an economic concept based upon a medical foundation. **Quick v. Martin**, 397 F.2d 644 (D.C. Cir. 1968); **Owens v. Traynor**, 274 F. Supp. 770 (D.Md. 1967), **aff'd**, 396 F.2d 783 (4th Cir. 1968), **cert. denied**, 393 U.S. 962 (1968). Thus, the extent of disability cannot be measured by physical or medical condition alone. **Nardella v. Campbell Machine, Inc.**, 525 F.2d 46 (9th Cir. 1975). Consideration must be given to claimant's age, education, industrial history and the availability of work he can perform after the injury. **American Mutual Insurance Company of Boston v. Jones**, 426 F.2d 1263 (D.C. Cir. 1970). Even a relatively minor injury may lead to a finding of total disability if it prevents the employee from engaging in the only type of gainful employment for which he is qualified. (**Id**. at 1266)

Claimant has the burden of proving the nature and extent of his disability without the benefit of the Section 20 presumption. **Carroll v. Hanover Bridge Marina**, 17 BRBS 176 (1985); **Hunigman v. Sun Shipbuilding & Dry Dock Co.**, 8 BRBS 141 (1978). However, once claimant has established that he is unable to return to his former employment because of a work-related injury or occupational disease, the burden shifts to the employer to demonstrate the availability of suitable alternative employment or realistic job opportunities which claimant is capable of performing and which he could secure if he diligently tried. **New Orleans (Gulfwide) Stevedores v. Turner**, 661 F.2d 1031 (5th Cir. 1981); **Air America v. Director**, 597 F.2d 773 (1st Cir. 1979); **American Stevedores, Inc. v. Salzano**, 538 F.2d 933 (2d Cir. 1976); **Preziosi v. Controlled Industries**, 22 BRBS 468, 471 (1989); **Elliott v. C & P Telephone Co.**, 16 BRBS 89 (1984). While Claimant generally need not show that he has tried to obtain employment, **Shell v. Teledyne Movible Offshore, Inc.**, 14 BRBS 585 (1981), he bears the burden of demonstrating his willingness to work, **Trans-State Dredging v. Benefits Review Board**, 731 F.2d 199 (4th Cir. 1984), once suitable alternative employment is shown. **Wilson v. Dravo Corporation**, 22 BRBS 463, 466 (1989); **Royce v. Elrich Construction Company**, 17 BRBS 156 (1985).

On the basis of the totality of this closed record, I find and conclude that this closed record establishes that Claimant was totally disabled until April 5, 1994 and then only partially disabled thereafter. The burden thus rests upon the Employer to demonstrate the existence of suitable alternate employment in the area. If the Employer does not carry this burden, Claimant is entitled to a finding of total disability. **American Stevedores,**

Inc. v. Salzano, 538 F.2d 933 (2d Cir. 1976); **Southern v. Farmers Export Company**, 17 BRBS 64 (1985). In the case at bar, the Employer did not submit any evidence as to the availability of suitable alternate employment. **See Pilkington v. Sun Shipbuilding and Dry Dock Company**, 9 BRBS 473 (1978), **aff'd on reconsideration after remand**, 14 BRBS 119 (1981). **See also Bumble Bee Seafoods v. Director, OWCP**, 629 F.2d 1327 (9th Cir. 1980). I therefore would find Claimant has a total disability until such time as he found work through his own efforts, as further discussed below.

Claimant's injury has become permanent. A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. **General Dynamics Corporation v. Benefits Review Board**, 565 F.2d 208 (2d Cir. 1977); **Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968), **cert. denied**, 394 U.S. 976 (1969); **Seidel v. General Dynamics Corp.**, 22 BRBS 403, 407 (1989); **Stevens v. Lockheed Shipbuilding Co.**, 22 BRBS 155, 157 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56 (1985); **Mason v. Bender Welding & Machine Co.**, 16 BRBS 307, 309 (1984). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of "maximum medical improvement." The determination of when maximum medical improvement is reached so that claimant's disability may be said to be permanent is primarily a question of fact based on medical evidence. **Lozada v. Director, OWCP**, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Care v. Washington Metropolitan Area Transit Authority**, 21 BRBS 248 (1988); **Wayland v. Moore Dry Dock**, 21 BRBS 177 (1988); **Eckley v. Fibrex and Shipping Company**, 21 BRBS 120 (1988); **Williams v. General Dynamics Corp.**, 10 BRBS 915 (1979).

The Benefits Review Board has held that a determination that claimant's disability is temporary or permanent may not be based on a prognosis that claimant's condition may improve and become stationary at some future time. **Meecke v. I.S.O. Personnel Support Department**, 10 BRBS 670 (1979). The Board has also held that a disability need not be "eternal or everlasting" to be permanent and the possibility of a favorable change does not foreclose a finding of permanent disability. **Exxon Corporation v. White**, 617 F.2d 292 (5th Cir. 1980), **aff'g** 9 BRBS 138 (1978). Such future changes may be considered in a Section 22 modification proceeding when and if they occur. **Fleetwood v. Newport News Shipbuilding and Dry Dock Company**, 16 BRBS 282 (1984), **aff'd**, 776 F.2d 1225, 18 BRBS 12 (CRT) (4th Cir. 1985).

Permanent disability has been found where little hope exists of eventual recovery, **Air America, Inc. v. Director, OWCP**, 597 F.2d 773 (1st Cir. 1979), where claimant has already undergone a large number of treatments over a long period of time, **Meecke v. I.S.O. Personnel Support Department**, 10 BRBS 670 (1979), even though there

is the possibility of favorable change from recommended surgery, and where work within claimant's work restrictions is not available, **Bell v. Volpe/Head Construction Co.**, 11 BRBS 377 (1979), and on the basis of claimant's credible complaints of pain alone. **Eller and Co. v. Golden**, 620 F.2d 71 (5th Cir. 1980). Furthermore, there is no requirement in the Act that medical testimony be introduced, **Ballard v. Newport News Shipbuilding & Dry Dock Co.**, 8 BRBS 676 (1978); **Ruiz v. Universal Maritime Service Corp.**, 8 BRBS 451 (1978), or that claimant be bedridden to be totally disabled, **Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968). Moreover, the burden of proof in a temporary total case is the same as in a permanent total case. **Bell**, **supra**. **See also Walker v. AAF Exchange Service**, 5 BRBS 500 (1977); **Swan v. George Hyman Construction Corp.**, 3 BRBS 490 (1976). There is no requirement that claimant undergo vocational rehabilitation testing prior to a finding of permanent total disability, **Mendez v. Bernuth Marine Shipping, Inc.**, 11 BRBS 21 (1979); **Perry v. Stan Flowers Company**, 8 BRBS 533 (1978), and an award of permanent total disability may be modified based on a change of condition. **Watson v. Gulf Stevedore Corp.**, **supra**.

An employee is considered permanently disabled if he has any residual disability after reaching maximum medical improvement. **Lozada v. General Dynamics Corp.**, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); **Sinclair v. United Food & Commercial Workers**, 13 BRBS 148 (1989); **Trask v. Lockheed Shipbuilding & Construction Co.**, 17 BRBS 56 (1985). A condition is permanent if claimant is no longer undergoing treatment with a view towards improving his condition, **Leech v. Service Engineering Co.**, 15 BRBS 18 (1982), or if his condition has stabilized. **Lusby v. Washington Metropolitan Area Transit Authority**, 13 BRBS 446 (1981).

A disability is considered permanent as of the date claimant's condition reaches maximum medical improvement or if the condition has continued for a lengthy period and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. **See Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968), **cert. denied**. 394 U.S. 976 (1969). If a physician believes that further treatment should be undertaken, then a possibility of improvement exists, and even if, in retrospect, the treatment was unsuccessful, maximum medical improvement does not occur until the treatment is complete. **Louisiana Ins. Guaranty Assn. v. Abbott,** 40 F.3d 122, 29 BRBS 22(CRT)(5th Cir. 1994); **Leech v. Service Engineering Co.,** 15 BRBS 18 (1982). If surgery is anticipated, maximum medical improvement has not been reached. **Kuhn v. Associated press**, 16 BRBS 46 (1983). If surgery is not anticipated, or if the prognosis after surgery is uncertain, the claimant's condition may be permanent. **Worthington v. Newport News Shipbuilding & Dry Dock Co.**, 18 BRBS 200 (1986); **White v. Exxon Corp.,** 9 BRBS 138 (1978), **aff'd mem**., 617 F.2d 292 (5th Cir. 1982).

On the basis of the totality of the record, I would find and conclude that Claimant was permanently and totally disabled from April 1, 1992 through April 5, 1994, and that he is permanently and partially disabled while he was working through is own efforts.

Sections 8(a) and (b) and Total Disability

A worker entitled to permanent partial disability for an injury arising under the schedule may be entitled to greater compensation under Sections 8(a) and (b) by a showing that he/she is totally disabled. **Potomac Electric Power Co. v. Director**, 449 U.S. 268 (1980) (herein "**Pepco**"). **Pepco**, 449 U.S. at 277, n.17; **Davenport v. Daytona Marine and Boat Works**, 16 BRBS 1969, 199 (1984). However, unless the worker is totally disabled, he is limited to the compensation provided by the appropriate schedule provision. **Winston v. Ingalls Shipbuilding, Inc.**, 16 BRBS 168, 172 (1984).

Two separate scheduled disabilities must be compensated under the schedules in the absence of a showing of a total disability, and claimant is precluded from (1) establishing a greater loss of wage-earning capacity than the presumed by the Act or (2) receiving compensation benefits under Section 8(c)(21). Since Claimant suffered injuries to more than one member covered by the schedule, he must be compensated under the applicable portion of Sections 8(c)(1) - (20), with the awards running consecutively. **Potomac Electric Power Co. v. Director, OWCP**, 449 U.S. 268 (1980). In **Brandt v. Avondale Shipyards, Inc.**, 16 BRBS 120 (1984), the Board held that claimant was entitled to two separate awards under the schedule for his work-related injuries to his right knee and left index finger.

With reference to Claimant’s residual work capacity, an employer can establish suitable alternate employment by offering an injured employee a light duty job which is tailored to the employee's physical limitations, so long as the job is necessary and claimant is capable of performing such work. **Walker v. Sun Shipbuilding and Dry Dock Co.**, 19 BRBS 171 (1986); **Darden v. Newport News Shipbuilding and Dry Dock Co.**, 18 BRBS 224 (1986). Claimant must cooperate with the employer's re-employment efforts and if employer establishes the availability of suitable alternate job opportunities, the Administrative Law Judge must consider claimant's willingness to work. **Trans-State Dredging v. Benefits Review Board, U.S. Department of Labor and Tarner**, 731 F.2d 199 (4th Cir. 1984); **Roger’s Terminal & Shipping Corp. v. Director, OWCP**, 784 F.2d 687 (5th Cir. 1986). An employee is not entitled to total disability benefits merely because he does not like or desire the alternate job. **Villasenor v. Marine Maintenance Industries, Inc.**, 17 BRBS 99, 102 (1985), **Decision and Order on Reconsideration**, 17 BRBS 160 (1985).

An award for permanent partial disability in a claim not covered by the schedule is based on the difference between claimant's pre-injury average weekly wage and his post-injury wage-earning capacity. 33 U.S.C. §908(c)(21)(h); **Richardson v. General Dynamics Corp.**, 23 BRBS (1990); **Cook v. Seattle Stevedoring Co.**, 21 BRBS 4, 6 (1988). If a claimant cannot return to his usual employment as a result of his injury but secures other employment, the wages which the new job would have paid at the time of claimant's injury are compared to the wages claimant was actually earning pre-injury to determine if claimant has suffered a loss of wage-earning capacity. **Cook**, **supra**. Subsections 8(c)(21) and 8(h) require that wages earned post-injury be adjusted to the wage levels which the job paid at time of injury. **See Walker v. Washington Metropolitan Area Transit Authority**, 793 F.2d 319, 18 BRBS 100 (CRT) (D.C. Cir. 1986); **Bethard v. Sun Shipbuilding & Dry Dock Co.**, 12 BRBS 691, 695 (1980).

It is now well-settled that the proper comparison for determining a loss of wage-earning capacity is between the wages claimant received in his usual employment pre-injury and the wages claimant's post-injury job paid **at the time of his injury**. **Richardson**, **supra**; **Cook**, **supra**.

The parties herein now have the benefit of a most significant opinion rendered by the First Circuit Court of Appeals in affirming a matter over which this Administrative Law Judge presided. In **White v. Bath Iron Works Corp.**, 812 F.2d 33 (1st Cir. 1987), Senior Circuit Court Judge Bailey Aldrich framed the issue as follows: "the question is how much claimant should be reimbursed for this loss (of wage-earning capacity), it being common ground that it should be a fixed amount, not to vary from month to month to follow current discrepancies." **White**, **supra**, at 34.

Senior Circuit Judge Aldrich rejected outright the employer's argument that the Administrative Law Judge "must compare an employee's post-injury actual earnings to the average weekly wage of the employee's time of injury" as that thesis is not sanctioned by Section 8(h).

Thus, it is the law in the First Circuit that the post-injury wages must first be adjusted for inflation and then compared to the employee's average weekly wage at the time of his/her injury. That is exactly what Section 8(h) provides in its literal language.

Claimant maintains that his post-injury wages are representative of his wage-earning capacity, that he has learned how to live with and cope with his medical condition and that his Employer has allowed him to compensate for his physical limitations. I agree as it is rather apparent to this Administrative Law Judge that Claimant is a highly-motivated individual who receives satisfaction in being gainfully employed. While there is no obligation on the part of the Employer to rehire

Claimant and provide suitable alternative employment, **see**, **e.g.**, **Trans-State Dredging v. Benefits Review Board**, 731 F.2d 199 (4th Cir. 1984), **rev'g and rem. on other grounds Tarner v. Trans-State Dredging**, 13 BRBS 53 (1980), the fact remains that had such work been made available to Claimant years ago, without a salary reduction, perhaps this claim might have been put to rest, especially after the Benefits Review Board has spoken herein and the First Circuit Court of Appeals, in **White**, **supra**.

The law in this area is very clear and if an employee is offered a job at his pre-injury wages as part of his employer's rehabilitation program, this Administrative Law Judge can find that there is no lost wage-earning capacity and that the employee therefore is not disabled. **Swain v. Bath Iron Works Corporation**, 17 BRBS 145, 147 (1985); **Darcell v. FMC Corporation, Marine and Rail Equipment Division**, 14 BRBS 294, 197 (1981). However, I am also cognizant of case law which holds that the employer need not rehire the employee, **New Orleans (Gulfwide) Stevedores, Inc. v. Turner**, 661 F.2d 1031, 1043 (5th Cir. 1981), and that the employer is not required to act as an employment agency. **Royce v. Elrich Construction Co.**, 17 BRBS 157 (1985).

As noted above, the Claimant was performing light duty work for the Employer after his injury in 1983. He continued to work in that capacity until a reduction in the work force resulted in his lay off in February, 1994.

In 1996, the Claimant was able to secure a job hooking up mainframe computers. (TR 68) On April 4, 1997, he began employment with Augat, Thomas & Betts as a fiber optic technician. He performed repetitive work consisting of splicing and installing cable wires. **Id.** at 72. He also used an electric screwdriver to perform his duties. (EX 41)

The Claimant continued to work until the company was acquired by Alcoa Fujicara. He was laid off in May, 2001. But for the lay off, he would have continued to work as a fiber optic technician. (TR 72) The Claimant was earning $14.50 an hour in May 2001.

A Labor Market Survey and Transferable Skills Analysis was prepared by Kathleen Dolan, a vocational case manager, on behalf of Electric Boat. She reviewed the Claimant's work history, employment records, and job duties as a machinist. She reviewed the correspondence and office notes of Dr. Browning, Dr. Wainwright, Dr. Kemper, Dr. Cotter, Dr. Dubois, Dr. Alessi and Vascular Associates. She also interviewed the Claimant and reviewed his deposition taken October 1, 2001. (EX 26)

There were no specific restrictions in regards to the Claimant's back injury in the file reviewed. Dr. Wainright released the Claimant with no restrictions for his hands. Ms. Dolan considered the restrictions the Claimant placed upon himself

when preparing the report. He indicated he would need to frequently alternate positions as needed, limit twisting/bending, lift no greater than 10-15 pounds on an infrequent basis. He claimed he had difficulty using his hands but did not provide any restrictions.

Ms. Dolan identified seven available positions under the broad job classifications of customer service, security positions, cashier, and front desk agent, which would be suitable for the Claimant. These occupational alternatives are feasible based upon Mr. Day's educational level, transferable skills and physical limitations, according to the Employer.

The following positions were identified by Ms. Dolan:

POSITION	**LOCATION**	**WEEKLY EARNINGS**	**EARNING CAPACITY IN 1992 DOLLARS**
Security Officer	Blackstone Valley Valley	$280-480	$221-379
Security	Professional Various	$280	$221
Cashier	Mobil Warwick, RI	$320	$253
Security Officer	RIBI	$260-360	$206=284
Front Desk Clerk	Marriott Providence	$328	$259
Front Desk Clerk	Holiday Inn No. Attleboro, MA	$320	$253
Front Desk Clerk	Extended Stay Warwick, RI	$320	$253

In addition, Ms. Dolan contacted three local staffing agencies, which did reveal potential positions for Fiber Optic Technicians. ADECO stated current positions were available for Fiber Optic Technicians, AGENTRY had a wide range of positions currently available and TECHNICAL STAFFING has positions available, based on experience.

The Claimant was earning $14.50 per hour or $580.00 per week for Alcoa Fujicara in May of 2001 as a Fiber Optic Technician. This was equivalent to $435.00 in 1992.

On April 9, 2002, the Claimant testified regarding his job search. He testified that he personally contacted the various employers listed in the Labor Market Survey between March 5th and March 8th. He testified regarding the security guard position at

Blackstone Valley Security on March 5, 2002. This position required a Bureau of Criminal Investigation report prepared by the Department of the Attorney General. The Claimant obtained this report and discovered that it contained criminal history of a simple assault charge against a police officer in 1972. He claimed that this should have been removed from his record and he is in the process of doing that. He was told that he would be notified regarding employment. (EX 41 at 7, 10)

The next position he investigated was at Professional Security. He completed an application and was told they would keep him in mind. (Ex 41 at 8)

The Claimant personally contacted Michael Brugnoli at RIBI Security. The position available consisted of only three days work per week. (EX 41 at 9)

Lastly, he personally contacted the three employment agencies listed in the Labor Market Survey. He submitted copies of his resume and expressed an interest in a position as a fiber optic technician. There were no positions available as fiber optic technicians at the three. (EX 41 at 14-15)

The Claimant also testified that he attended a three-hour resume and cover letter workshop on March 4, 2002. He provided a copy of the certificate of attendance. He claims this was an attempt to update and improve his current resume. He also provided a copy of his updated resume. (EX 41 at 18)

At his deposition, the Claimant testified that he did not make any follow up calls or visits from the date he contacted the employers or the staffing agencies. Claimant testified during his first deposition that he was collecting unemployment compensation at the time. He described that his typical day was spent at the unemployment office job searching. He did not recall that statement at his second deposition and had only attended the resume workshop. (EX 41 at 17, 31)

The Claimant did not forward any information to the security agencies regarding his attempt to expunge his criminal record. He testified he would provide it if they called him. (EX 41 at 7, 8) By the Claimant's own testimony, all job identified were within his physical restrictions. (EX 41 at 17)

As already noted above, the United States Court of Appeals for the Second Circuit has held that total disability does not become partial until the date on which suitable alternate employment is shown to be available. **Palombo v. Director, OWCP and General Dynamics Corp.**, 937 F.3d 70, 25 BRBS 1 (CRT) (2nd Cir. 1991). Thus, Claimant would be entitled to permanent partial disability benefits as of the date he began working through his own efforts.

In this case, Claimant returned to a light duty clerical position in the Pipe Shop Planning Department after his 1982 injury. The medical evidence establishes that the Claimant was able to perform this work in spite of his ongoing treatment for chronic lumbar and cervical complaints. His only restrictions in 1992 consisted of "avoid stress to neck and upper extremities." (CX 9)

After his lay off in 1994, Claimant pursued a claim under the State Act. An evaluation conducted by the Donley Center and ordered by the Court, determined that the Claimant was capable of working in light duty capacity. This was based on a physical evaluation and review of medical documentation. (EX 19)

The Claimant sought employment after his lump sum settlement. He provided prospective employers with a resume that listed him as a manager for "American Restoration" from 1995 to present. He testified at his deposition that this was a "fictitious" company to explain his time out of the workforce due to workers' compensation. (EX 41 at 4)

As a Fiber Optic Technician for Thomas, Auger & Betts, and later Alcoa Fujicara, he was required to use an electric screwdriver. (EX 41 at 13) He told Dr. Wainright he "occasionally" used air-powered tools. (EX 8) He also described his job as stripping out cable and assembling cabinets. (EX 41 at 13) According to Claimant, Augat, Thomas & Betts was sold to Alcoa Fujicara in January, 2001. **Id.**

Claimant by his own testimony was capable of performing suitable alternate employment within his own restrictions as of 1996 when he started his employment with EMC (Tr 68), and I so find and conclude.

Claimant is not totally disabled. He re-entered the workforce in 1996 as soon as he was able to secure a job. After his lay-off from Alcoa Fujicara, he sought unemployment compensation benefits. He presented himself as willing and able to accept employment. His earning capacity is equivalent to the salary he received in May, 2001 which converts to $435.00 per week in 1992, and I so find and conclude.

Claimant was awarded worker's compensation benefits by the State of Rhode Island. He received prior compensation in the amount of $82,044.81. The Employer submits that it is entitled to a credit for prior awards as set forth in Section 3(e) of the Act.

Claimant sought benefits under the State Act after his lay off from Electric Boat. As soon as he realized a lay off was imminent from his present employer, Alcoa Fujicara, he sought compensation benefits under the Federal Act, and I so find and conclude.

With reference to the medical ratings for Claimant's HAVS, I find and conclude that it would be reasonable to average Dr. Browning's rating of thirty-two (32%) percent and Dr. Wainright's ratings of five (5%) percent and three (3%) percent, respectively.

As noted above, in the case **sub judice**, the parties are in agreement that Claimant is, in fact, employable and that he has been gainfully employed for the period of time summarized above, but the parties are in disagreement as to Claimant's post-injury wage-earning capacity. Thus, in my judgment, **Air America**, **supra**, and **Argonaut Insurance Co.**, **supra**, are distinguishable as involving claims for total disability benefits.

Medical Expenses

An Employer found liable for the payment of compensation is, pursuant to Section 7(a) of the Act, responsible for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. **Perez v. Sea-Land Services, Inc.**, 8 BRBS 130 (1978). The test is whether or not the treatment is recognized as appropriate by the medical profession for the care and treatment of the injury. **Colburn v. General Dynamics Corp.**, 21 BRBS 219, 22 (1988); **Barbour v. Woodward & Lothrop, Inc.**, 16 BRBS 300 (1984). Entitlement to medical services is never time-barred where a disability is related to a compensable injury. **Addison v. Ryan-Walsh Stevedoring Company**, 22 BRBS 32, 36 (1989); **Mayfield v. Atlantic & Gulf Stevedores**, 16 BRBS 228 (1984); **Dean v. Marine Terminals Corp.**, 7 BRBS 234 (1977). Furthermore, an employee's right to select his own physician, pursuant to Section 7(b), is well settled. **Bulone v. Universal Terminal and Stevedore Corp.**, 8 BRBS 515 (1978). Claimant is also entitled to reimbursement for reasonable travel expenses in seeking medical care and treatment for his work-related injury. **Tough v. General Dynamics Corporation**, 22 BRBS 356 (1989); **Gilliam v. The Western Union Telegraph Co.**, 8 BRBS 278 (1978).

In **Shahady v. Atlas Tile & Marble**, 13 BRBS 1007 (1981), **rev'd on other grounds**, 682 F.2d 968 (D.C. Cir. 1982), **cert. denied**, 459 U.S. 1146, 103 S.Ct. 786 (1983), the Benefits Review Board held that a claimant's entitlement to an initial free choice of a physician under Section 7(b) does not negate the requirement under Section 7(d) that claimant obtain employer's authorization prior to obtaining medical services. **Banks v. Bath Iron Works Corp.**, 22 BRBS 301, 307, 308 (1989); **Jackson v. Ingalls Shipbuilding Division, Litton Systems, Inc.**, 15 BRBS 299 (1983); **Beynum v. Washington Metropolitan Area Transit Authority**, 14 BRBS 956 (1982). However, where a claimant has been refused treatment by the employer, he need only establish that the treatment he subsequently procures on his own initiative was necessary in order to be entitled to such treatment at the employer's expense. **Atlantic &**

Gulf Stevedores, Inc. v. Neuman, 440 F.2d 908 (5th Cir. 1971); **Matthews v. Jeffboat, Inc.**, 18 BRBS at 189 (1986).

An employer's physician's determination that Claimant is fully recovered is tantamount to a refusal to provide treatment. **Slattery Associates, Inc. v. Lloyd**, 725 F.2d 780 (D.C. Cir. 1984); **Walker v. AAF Exchange Service**, 5 BRBS 500 (1977). All necessary medical expenses subsequent to employer's refusal to authorize needed care, including surgical costs and the physician's fee, are recoverable. **Roger's Terminal and Shipping Corporation v. Director, OWCP**, 784 F.2d 687 (5th Cir. 1986); **Anderson v. Todd Shipyards Corp.**, 22 BRBS 20 (1989); **Ballesteros v. Willamette Western Corp.**, 20 BRBS 184 (1988).

Section 7(d) requires that an attending physician file the appropriate report within ten days of the examination. Unless such failure is excused by the fact-finder for good cause shown in accordance with Section 7(d), claimant may not recover medical costs incurred. **Betz v. Arthur Snowden Company**, 14 BRBS 805 (1981). **See also** 20 C.F.R. §702.422. However, the employer must demonstrate actual prejudice by late delivery of the physician's report. **Roger's Terminal**, **supra**.

It is well-settled that the Act does not require that an injury be disabling for a claimant to be entitled to medical expenses; it only requires that the injury be work related. **Romeike v. Kaiser Shipyards**, 22 BRBS 57 (1989); **Winston v. Ingalls Shipbuilding**, 16 BRBS 168 (1984); **Jackson v. Ingalls Shipbuilding**, 15 BRBS 299 (1983).

On the basis of the totality of the record, I find and conclude that Claimant has shown good cause, pursuant to Section 7(d). Claimant advised the Employer of his work-related injury in a timely manner and requested appropriate medical care and treatment. However, the Employer did not accept the claim and did not authorize such medical care. Thus, any failure by Claimant to file timely the physician's report is excused for good cause as a futile act and in the interests of justice as the Employer refused to accept the claim.

That Claimant did not seek medical treatment for several years is no defense herein because Claimant was told by his prior attorney that his state settlement foreclosed his entitlement to future medical benefits.

As a claim for medical benefits is never time-barred, the Employer shall immediately authorize and pay for the reasonable and necessary medical care and treatment for Claimant's lumbar, cervical and bilateral hand/arm problems. Such medical benefits shall commence on August 17, 2000 (CX 1), the date on which Claimant filed for benefits, and shall be subject to the provisions of Section 7 of the Act.

Interest

Although not specifically authorized in the Act, it has been accepted practice that interest at the rate of six (6) percent per annum is assessed on all past due compensation payments. **Avallone v. Todd Shipyards Corp.**, 10 BRBS 724 (1978). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to ensure that the employee receives the full amount of compensation due. **Watkins v. Newport News Shipbuilding & Dry Dock Co.**, 8 BRBS 556 (1978), **aff'd in pertinent part** and **rev'd on other grounds sub nom. Newport News v. Director, OWCP**, 594 F.2d 986 (4th Cir. 1979); **Santos v. General Dynamics Corp.**, 22 BRBS 226 (1989); **Adams v. Newport News Shipbuilding**, 22 BRBS 78 (1989); **Smith v. Ingalls Shipbuilding**, 22 BRBS 26, 50 (1989); **Caudill v. Sea Tac Alaska Shipbuilding**, 22 BRBS 10 (1988); **Perry v. Carolina Shipping**, 20 BRBS 90 (1987); **Hoey v. General Dynamics Corp.**, 17 BRBS 229 (1985). The Board concluded that inflationary trends in our economy have rendered a fixed six percent rate no longer appropriate to further the purpose of making claimant whole, and held that ". . . the fixed six percent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. §1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills . . . ." **Grant v. Portland Stevedoring Company**, 16 BRBS 267, 270 (1984), **modified on reconsideration**, 17 BRBS 20 (1985). Section 2(m) of Pub. L. 97-258 provided that the above provision would become effective October 1, 1982. This Order incorporates by reference this statute and provides for its specific administrative application by the District Director. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

Section 14(e)

Claimant is not entitled to an award of additional compensation, pursuant to the provisions of Section 14(e), as such award cannot be made for unpaid past medical benefits.

Attorney's Fee

Claimant's attorney, having successfully prosecuted this matter, is entitled to a fee assessed against the Employer as a self-insurer. Claimant's attorney shall file a fee application concerning services rendered and costs incurred in representing Claimant after January 10, 2001, the date of the informal conference. Services rendered prior to this date should be submitted to the District Director for her consideration. The fee petition shall be filed within thirty (30) days of receipt of this

Decision and the Employer shall have fourteen (14) days to comment thereon.

ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I issue the following compensation order. The specific dollar computations of the compensation award shall be administratively verified by the District Director.

It is therefore **ORDERED** that:

1. The Employer as a self-insurer shall authorize and pay for such reasonable, appropriate and necessary medical care and treatment as the Claimant's work-related injury, **i.e.** his lumbar, cervical and bilateral hand/arm problems, referenced herein may require, subject to the provisions of Section 7 of the Act, and such benefits shall commence on August 17, 2000.

2. Claimant's attorney shall file, within thirty (30) days of receipt of this Decision and Order, a fully supported and fully itemized fee petition, sending a copy thereof to Employer's counsel who shall then have fourteen (14) days to comment thereon. This Court has jurisdiction over those services rendered and costs incurred after the informal conference on January 10, 2001.

A

DAVID W. DI NARDI
District Chief Judge

Boston, Massachusetts
DWD:jl